Abidin bin Umar v Doraisamy & Anor

HIGH COURT (TAIPING) — CIVIL SUIT NO 23-01-93
ABDUL MALIK ISHAK JC
30 DECEMBER 1993

Civil Procedure *— Parties — Addition of co-defendant to suit — Whether plaintiff can be compelled to add a co-defendant against whom the plaintiff does not wish to proceed — Rules of the High Court 1980 O 15 r 6(2)(b)*

The plaintiff sued the defendants for damages arising out of an accident involving two lorries. At the material time, the plaintiff was the lorry attendant of the lorry driven by one Salleh bin Ani ('Salleh') that collided with a stationary lorry driven by the first defendant and owned by the second defendant. The defendants applied by way of summons-in-chambers for Salleh to be joined as one of the defendants and for the plaintiff to amend the title to his writ by incorporating Salleh as one of the defendants. The application was made under O 15 r 6(2)(b) of the Rules of the High Court 1980 ('the RHC'). The sole issue to be decided was whether the court, in the exercise of its discretion under O 15 r 6(2)(b) of the RHC and, upon the application of the defendants, was in a position to compel the reluctant plaintiff to add Salleh as a co-defendant.

Held, allowing the application:
Bearing in mind that at the material time of the accident, the plaintiff was asleep, he was not in a position to describe the movements of the lorry he was on nor that of the other lorry before the accident. The pleadings clearly showed that the accident happened as a result of a collision from the rear. It is now trite law that a driver following another vehicle should drive in such a fashion as will enable him to deal with all traffic exigencies. This aspect of the case can only be extracted from Salleh. Consequently, on a reasonable and probable basis, Salleh as the proposed co-defendant, could shed light as to whether there was in fact a collision from the rear and for this purpose, it was prudent to make him a co-defendant.

[Bahasa Malaysia summary

Plaintif telah mendakwa defendan untuk mendapat ganti rugi yang timbul akibat suatu kemalangan di antara dua buah lori. Pada masa yang penting, plaintif merupakan pengiring lori yang dipandu oleh seorang yang bernama Salleh bin Ani ('Salleh') yang telah berlanggar dengan sebuah lori yang tidak bergerak yang dipandu oleh defendan pertama dan dimiliki oleh defendan kedua. Kedua-dua defendan telah memohon melalui saman dalam kamar supaya Salleh dicantum sebagai seorang defendan dan supaya plaintif meminda tajuk writnya dan menambahkan Salleh sebagai seorang defendan. Permohonan itu telah dibuat di bawah A 15 k 6(2)(b) Kaedah-Kaedah Mahkamah

Tinggi 1980 ('KMT itu'). Isu tunggal yang perlu diputuskan adalah sama ada mahkamah, melalui budi bicaranya di bawah A 15 k 6(2)(b) KMT itu dan, atas permohonan defendan, berkedudukan untuk memaksa plaintif yang enggan mencantum Salleh sebagai seorang defendan bersama.

Diputuskan, membenarkan permohonan itu:
Memandangkan bahawa pada masa yang penting itu, plaintif sedang tidur, beliau tidak dapat menggambarkan pergerakan lori yang beliau menaiki mahupun lori yang lain itu sebelum kemalangan itu. Pliding menunjukkan dengan jelas bahawa kemalangan itu berlaku akibat suatu perlanggaran dari belakang. Adalah menjadi undang-undang mantap bahawa seseorang pemandu yang mengikut kenderaan yang lain sepatutnya memandu dengan cara yang akan membenarkan beliau menghadapi segala kecemasan trafik. Aspek kes ini hanya boleh didapati daripada Salleh. Oleh itu, atas asas yang munasabah dan mungkin, Salleh sebagai defendan bersama yang dicadangkan, akan dapat menjelaskan sama ada pada hakikatnya, terdapat suatu perlanggaran dari belakang dan oleh itu, adalah bijak supaya beliau dijadikan seorang defendan bersama.]

Cases referred to

1 *Hee Awa & Ors v Syed Muhammad Sazalay & Anor* [1988] 1 MLJ 300 (folld)
2 *Chan Yee v Chan Yoke Fong* [1990] 3 MLJ 297 (folld)
3 *Wong Kin How & Anor v Hayati bte Zahari & Anor* [1992] 3 CLJ 1767 (folld)
4 *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1991] 2 CLJ 1212; [1993] 2 MLJ 143 (folld)

Legislation referred to

Rules of the High Court 1980 O 15 r 6(2)(b)

Ahmad Taufiq bin Baharum (*Abdul Halim Said & Co*) for the plaintiff.
VT Singam (*VT Singam & Co*) for the defendants.

Abdul Malik Ishak JC: The plaintiff sued the defendants for damages arising out of an accident involving two motor lorries on 25 January 1991 at 12.30pm at the 17.9km Lebuhraya Changkat Jering–Ipoh. At the material time, the plaintiff was the lorry attendant of a motor lorry registered as KY 9492 driven by one Salleh bin Ani that collided in the rear of the stationary motor lorry registered as R 5821. Motor lorry R 5821 was driven by the first defendant and was owned by the second defendant.

The defendants applied by way of summons-in-chambers for Salleh bin Ani to be joined as one of the defendants and for the plaintiff to amend the title to his writ by incorporating Salleh bin Ani as one of the defendants.

A The application was made under O 15 r 6(2)(b) of the Rules of the High Court 1980 ('the RHC') which reads as follows:

> At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —
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> ...
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> B (b) order any of the following persons to be added as a party, namely —
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> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
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> (ii) any person between whom and any party to the cause or matter there C may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;
>
> D but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

The defendants in support of their application caused one Urshela Tharumalingam, a solicitor from Messrs VT Singam & Co, to affirm an affidavit where it was averred that the collision from the rear was caused or E substantially contributed to by the negligence of Salleh bin Ani, the driver of motor lorry KY 9492. It was averred further that the particulars of the negligence of Salleh bin Ani were set out in the statement of defence and counterclaim of the defendants. It was also averred that since Salleh bin Ani contributed to the accident it was necessary that he be added as a co-defendant to enable the court to adjudicate upon the matter effectively — F 'demi kepentingan keadilan'. Several documents were attached and exhibited as exhibits, including the police report of the plaintiff which gave the picture that the plaintiff was asleep at the time of the accident.

The plaintiff opposed the application and caused Encik Mazlan bin Abdul Rahman, a solicitor from Messrs Abdul Halim Said & Co, to affirm an affidavit to the effect that, inter alia: G

(1) the negligence of Salleh bin Ani was not an issue in the plaintiff's claim;
(2) the plaintiff intended and had elected to sue the defendants only;
(3) to bring in Salleh bin Ani as a co-defendant would prejudice the plaintiff's claim; and
(4) the 'kepentingan keadilan' would not be affected by not incorporating H Salleh bin Ani as a co-defendant as all the documents were exhibited in the affidavit of Urshela Tharumalingam and such documents, whether agreed or otherwise, would be produced in the course of the trial of the civil suit.

I The sole issue to be decided in the defendants' application is this: Whether the court, in the exercise of its discretion under O 15 r 6(2)(b) of the RHC and, upon the application of the defendants, was in a position to compel the reluctant plaintiff to add Salleh bin Ani as a co-defendant?

The matter seems to be settled by the Supreme Court case of *Hee Awa & Ors v Syed Muhammad Sazalay & Anor.*[1] Briefly put, the facts in *Hee Awa*'s case[1] was that there was an accident involving a motor cycle and a Government motor van in which the pillion rider of the motor cycle was killed and the passenger in the motor van was injured. The injured passenger claimed damages for negligence against the motor-cyclist in the sessions court and the van driver and the Government of Malaysia were made third parties. The parents of the deceased pillion rider claimed damages under ss 7 and 8 of the Civil Law Act 1956 in the High Court against the van driver and the Government of Malaysia. The respondent applied under O 15 r 6(2)(b) of the RHC for leave to make the motor-cyclist a co-defendant. The senior assistant registrar dismissed the application. The High Court allowed the appeal and ordered the motor-cyclist to be made a co-defendant. In dismissing the appeal, Mohamed Azmi SCJ speaking for the Supreme Court held, inter alia, that:

(1) the respondent's application fell squarely within O 15 r 6(2)(b) of the RHC;
(2) the respondent had a choice to proceed either under O 15 r 6(2)(b) or O 16 of the RHC;
(3) there was nothing in the RHC to prevent the respondent from making that choice and once the choice was made, that was the end of the matter;
(4) the order so made was to ensure that all matters in dispute might be effectively and completely determined and adjudicated upon as set out in O 15 r 6(2)(b) of the RHC; and
(5) the learned judge had exercised his discretion properly.

Some two years later, the Supreme Court had occasion to consider in depth *Hee Awa*'s case,[1] and this was in the case of *Chan Yee v Chan Yoke Fong.*[2] Lee Hun Hoe CJ (Borneo) (as he then was) in delivering the decision of *Chan Yee*'s case[2] agreed with the decision of *Hee Awa*'s case[1] and found that it had no reason to depart from it.

The facts in *Chan Yee*'s case[2] was that two motor cycles were involved in a collision resulting in the death of the pillion rider. The respondent/defendant was the rider of motor cycle AAR 7461. Lee Hoy Mun was the rider of motor cycle AAS 4483 with a pillion rider. The motor cycles were involved in a collision resulting in the death of the pillion rider. The appellant/plaintiff, being the father of the deceased pillion rider sued the respondent/defendant for damages for himself and his wife, the mother of the deceased pillion rider. The respondent/defendant applied by summons for leave to bring in Lee Hoy Mun as a co-defendant under O 15 r 6 of the RHC. It was argued before the Supreme Court, inter alia, that *Hee Awa*'s case[1] was decided per incuriam. To this, Lee Hun Hoe CJ (Borneo) speaking for and in delivering the decision of *Chan Yee*'s case[2] had this to say [at p 301]:

> It is necessary to bear in mind that the question before this court in the *Hee Awa*'s case was one of the true interpretation of a particular provision of the RHC. We have carefully considered the judgment in that case which dealt

A comprehensively with the contentions of the parties. We are unable to fasten on any part of the decision under consideration and to say that there is any slip or error. If we are to accept the contention of the appellant it would necessarily make the proposition that it is open to this court to disregard an earlier decision of its own whenever it is made to appear that the court has not on the earlier occasion, the benefit of the best argument that the researches and industry that B counsel could provide. Such a proposition would open the floodgate to numerous and costly attempts to re-open questions which have been authoritatively decided.

Lamin J in *Wong Kin How & Anor v Hayati bte Zahari & Anor*[3] dismissed the appeal with costs of the appellants (plaintiffs) who had appealed against the decision of the sessions court judge in allowing one Lee Yew Fie to be C added as the third defendant on the application of the respondents (defendants). Lee Yew Fie was the driver of the motor van involved in an accident and the second plaintiff had been a passenger in the said van. In a short judgment, his Lordship followed the Supreme Court decisions of *Hee Awa*[1] and *Chan Yee*.[2]

In *Tajjul Ariffin bin Mustafa v Heng Cheng Hong*,[4] KC Vohrah J had to D consider the question, on an appeal, whether the defendant, in an application for joinder of a co-defendant, could compel the plaintiff to amend the statement of claim by pleading negligence. Within a narrow compass, the facts in *Tajjul Ariffin*[4] can be stated thus. The plaintiff who was the pillion rider on a motor cycle had sued the defendant for damages arising out of a E road accident. In due course, the defendant made an application for the following prayers:

(1) the joinder of the rider of the motor cycle, Lim Ah Chooi, and the owner of the motor cycle, Lim Yu Hua, as co-defendants;
(2) for the plaintiff to amend the statement of claim to add the names of F Lim Ah Chooi and Lim Yu Hua;
(3) for the plaintiff to amend the statement of claim to plead negligence against Lim Ah Chooi and Lim Yu Hua; and
(4) for the incidental or related matters.

The plaintiff had no objection to the defendant's application except for the G application in prayer (3). The sessions court judge allowed all the applications except for prayer (3) where she held that she could not compel the plaintiff to plead negligence against the intended co-defendant as this would involve substantive rather than procedural law. On appeal, KC Vohrah J agreed with the sessions court judge and dismissed the appeal. The case went up to the Supreme Court where it was held, inter alia, that a plaintiff cannot H be forced, upon the application of the defendant, to have a second defendant added, against whom he does not wish to proceed for the reason that the negligence of the intended second defendant is not an issue involved in the claim he has made. But the Supreme Court in coming to this decision analysed *Hee Awa*[1] and *Chan Yee*[2] microscopically and drew a fine I distinguishing mark when Edgar Joseph Jr SCJ said [at p 153]:

> It is in the light of these principles that the cases of *Hee Awa* and *Chan Yee*, should be considered. In other words, the judgment in those cases should be read in the light of the facts of those cases and not as imposing any fetter on the

exercise of the discretion given to a judge when considering an application by the defendant for joinder of a defendant, over the objections of the plaintiff, in any new case. A

In another part of his judgment [at p 152], Edgar Joseph Jr SCJ said:

It follows, that if judges were to attempt to lay down any general rule for the exercise of a discretion created under the relevant rule of the court then, as was pointed out by Brett MR in *The Friedberg* 10 P 112 at p 113 they would be trying to fetter their own discretion and that of their successors which they would have no legal power to do. B

Again, in another part of his judgment [at p 153], Edgar Joseph Jr SCJ said:

....insofar as the power of the court to add a defendant on the application of the defendant against the wishes of the plaintiff is concerned, the jurisdiction of the court is entirely discretionary and the only fetter which RHC O 15 r 6(2)(b)(ii) places upon the exercise of the discretion which it gives to the judge of first instance is that it shall be exercised when there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between the person sought to be joined and that party as well as between the parties to the cause or matter. C D

In short, the Supreme Court in *Tajjul Ariffin*[4] did not fetter the discretionary power of the court of first instance to add a co-defendant upon the application of the defendant against the wishes of the plaintiff. E

Now, in the application before me (it is pertinent to note that there is no prayer (3) like in *Tajjul Ariffin*[4]), I need to consider whether Salleh bin Ani as the proposed co-defendant was wholly or partly responsible for the accident? From the statement of claim, it was averred that the accident occurred as a result of the negligence or contributory negligence of the defendants. The particulars of the defendants' negligence were itemized, the relevant portions being: F

(d) menyebabkan plaintif berada dalam keadaan penuh kecemasan dan tidak mempunyai peluang untuk mengelakkan kemalangan tersebut;
(f) tidak memberikan plaintif peluang untuk mengelak daripada perlanggaran;
(g) meletakkan plaintif di dalam keadaan penuh kecemasan tanpa memberikan peluang apa-apapun untuk mengelakkan daripada pelanggaran tersebut di atas; G
(h) mengetahui akan kehadiran kenderaan atau plaintif di belakangnya tetapi masih gagal untuk memberi sebarang amaran ataupun isyarat sewaktu memberhentikan motor lorinya menyebabkan mustahil bagi plaintif mengelakkan kemalangan tersebut; H
(i) tidak meletakkan sebarang tanda semasa meletakkan sebarang atau memberhentikan motor lorinya di atas jalan dalam keadaan cuaca gelam (kelam);
(m) dengan tiba-tiba dan tanpa sebarang amaran berhenti di atas jalan plaintif;
(o) menyebabkan satu kemalangan di hadapan plaintif dengan secara tiba-tiba;
(p) gagal mempunyai apa-apa atau apa-apa penunjuk yang betul; I
(q) gagal untuk menunjukkan apa-apa atau apa penunjuk yang betul;
(r) gagal memasang lampu signal motor lorinya;
(s) gagal untuk berhenti di tepi jalan;

A (t) berhenti di atas jalan sewaktu ianya bahaya dan tidak selamat berbuat demikian; dan

(u) memandu dengan tiada sebarang timbang rasa terhadap pengguna jalan khasnya plaintif.

Bearing in mind that at the material time of the accident, the plaintiff as a lorry attendant of motor lorry KY 9492 was asleep, how could he possibly have coughed up the particulars of negligence against the defendants, in particular against the first defendant? What actually happened to motor lorry KY 9492 can only be narrated by the driver of that motor lorry, viz, Salleh bin Ani. The plaintiff was not in a position to describe the movements of motor lorry KY 9492 nor that of motor lorry R 5821 before the accident. How could he? Being fast asleep, it boggles the mind to read the particulars of negligence of the defendants as alleged by the plaintiff.

The pleadings clearly showed that the accident happened as a result of a collision from the rear. It is now trite law that a following driver should take up such a position and drive in such a fashion as will enable him to deal with all traffic exigencies.

This aspect of the case can only be extracted from Salleh bin Ani. Even the defendants in their statement of defence and counterclaim averred positively the role played by Salleh bin Ani. Consequently, on a reasonable and probable basis, I am of the considered view that Salleh bin Ani, as the proposed co-defendant, could shed light as to whether there was in fact a collision from the rear and for this purpose it is prudent to make him a co-defendant.

It is germane, at this juncture, to quote a passage of the judgment of Edgar Joseph Jr SCJ in *Tajjul Ariffin*[4] [at p 153] to the following effect:

> ... the objects of para (2)(b) as to joinder of parties are generally speaking the same as the objects of the rules governing third party proceedings, that is to say:
>
> (1) to prevent multiplicity of proceedings and to enable the court to determine disputes between all parties to them in one action, and
>
> (2) to prevent the same or substantially the same questions or issues being tried all over again with possibly different results. (See *Supreme Court Practice* (1991) para 15/6/7 at p 193).

Alternatively, I am of the considered view that Salleh bin Ani ought to be joined as a party as his presence is necessary to ensure that all matters in disputes may be effectually and completely determined and adjudicated upon. Only Salleh bin Ani knew what happened that night when he drove the 'sleeping plaintiff' in motor lorry KY 9492.

Accordingly, I order that Salleh bin Ani be joined as a co-defendant and the plaintiff to amend the title to his writ by incorporating Salleh bin Ani as one of the defendants. Costs in the cause to the defendants.

Order accordingly.

Reported by Jeanne Tan